Transforming Regulation and Governance in the Public Interest

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EXECUTIVE SUMMARY

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Transforming Regulation and Governance

1.0 THE FUTURE OF THE LEGAL PROFESSION AND IMPACT ON REGULATION

The legal profession is in the midst of a period of dramatic and profound change. Are we moving into an epoch of chaos, ‘creative destruction’ or reconstruction in the legal profession? Will changes taking place in the legal profession in other parts of the world really impact lawyers in small, remote Nova Scotia? Should we wait for the changes to come to us, or boldly go forward and be proactive; i.e., do we prepare to ride the ‘tsunami of change’ or let it wash over us and hope for the best?

Is there evidence from these changes that demonstrates a need to transform regulation of the profession? What are the risks and opportunities looming ahead? Is our current regulatory regime equipped to protect the public and support the profession in the face of emerging changes and trends in the practice of law? If the Society embarks on a transformational process, what does it need to understand about the future of the practice of law in order to design the best, most robust and most agile regulatory regime possible?

Does the future of the legal profession require that we truly transform how we regulate, and act as a change agent, or should we simply revise the existing structure and be more of a passenger than a driver? What will best serve the public interest?

Much current thinking about the future is founded on current facts and evidence, and trends emerging around the world. The trends are not ‘futuristic’ but are grounded in reality, and must be factored into any consideration of a new regulatory regime.

What follows is a non-exhaustive list of current trends that are impacting, or are anticipated to impact, the practice of law and regulation of the profession. Each represents both risks and opportunities:

1. technology, including access to legal information and products online, virtual law practice, growth in non-lawyer provision of legal services, products and information;
2. unbundling of legal services and specialization; client empowerment, expectations and demands for increased value at reduced cost;
3. changes in law firm structure and ownership;
4. regulation of lawyers vs. law firms vs. legal services/service providers;
5. growth of corporate and in-house counsel;
6. globalization and evolution of the legal services market;
7. membership demographics and the aging Bar in Nova Scotia; and
8. access to justice.

1.1 Technology and access to legal information and products online, virtual law practice, and growth in non-lawyer provision of legal services, products and information

The CBA Legal Futures Initiative should be carefully considered as Council analyzes what law societies should be aware of in any future regulatory design. With respect to the impact of new technology, the report states:

The rapid growth in innovation and adoption of new technologies may play a transformative role in helping the legal industry in Canada develop new forms of service delivery, knowledge development and management. For example, the future could see the development of a full-blown, technology-enabled legal marketplace, including virtual law firms. The growth of artificial

intelligence (AI) could replace lawyers for many tasks such as “assisted discovery” and eventually even advice, at the same time saving clients both time and money.

The growth of electronic communication, including social networking, will not only change how interactions may take place in the future, but also the expectations of a new generation of clients and lawyers on how business should be conducted and how services should be delivered – quickly, directly, and, in many cases, online. New forms of online competition already exist and more are likely on the way.2

The rapid growth in innovation and technology has played and is playing a transformative role in the legal profession, and that most of the future predictions noted above are already taking place in Europe and elsewhere.

Jordan Furlong examined the five catalysts at work in the Canadian legal services marketplace in 2010, and spoke of the impact on the profession of better-informed clients:

Consumer clients, meanwhile, thanks to Google, Facebook and other advances, can tap into an unprecedented collection of knowledge and personal experiences about the legal system, and now often approach their lawyers with basic legal information already in hand … . The internet has also largely devalued legal information and knowledge, which is now widely and cheaply disseminated.3

Furlong discusses the ‘widespread automation of legal services’ and the impact on the profession:

Most lawyers who draft agreements produce documents, paper a transaction or otherwise engage in content- or knowledge-focused tasks work for global firms servicing multinational clients or high-volume bulk-deliver firms. This type of work, which used to constitute the majority of many lawyers’ offerings, has largely been automated. Even the most complicated tasks have been template, flowcharted, and relegated to software. Lawyers in this decade no longer try to do what machines can do better, faster and cheaper. Law firms that sell this kind of work make extensive use of this technology – it is a tool, not a revenue source.4

He lists some of the many online tools now available to the public and clients:

Title insurance policies and do-it-yourself will kits, innovations dating from the end of the 1990s, can both reasonably be called legal services and are unremarkable features of the marketplace today. They have recently been joined by online divorce form generators and the earliest iterations of intelligent legal document assembly programs. Legal knowledge companies have developed templates that allow users to create customized legal documents themselves, with no intervention by a lawyer. These interactive programs are perhaps designed in part by lawyers, but rarely are they directly administered by lawyers, and in any event, they usually compete with lawyers for client business. The scope and sophistication of these programs will explode in the years to come – clients will come to use them more and to rely on them more.5

There are many examples of the impact of technology on the profession, which present challenges and opportunities for regulation. No longer can we rely on the fact of a bricks-and-mortar law firm when we

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2 Canadian Bar Association Legal Futures Initiative Report (June 2013), p. 5 (Futures Initiative), http://www.cbafutures.org/
4 Ibid, p. 4
5 Ibid, p. 7
conduct an audit or practice review – these processes need to be designed to deal with virtual law firms, where client files and information are stored solely electronically and in ‘the cloud’ (which is usually actually a basement bunker). New businesses have been developed solely around the provision of legal information and services, including document drafting, fully online. With this enhancement to access to legal information and, arguably ‘justice’, should a regulator respond with paranoia about the erosion of the role of lawyers, or help lawyers embrace the technology wave, be creative and create opportunities for new business structures that support and encourage these new ways of doing business? In the face of increased use of technology in the legal profession, how can we help support and maintain relationships, between the Society and lawyers, between lawyers and clients, which will always be at the heart of the legal profession?

1.2 Unbundling of legal services and specialization; client empowerment, expectations and demands for increased value at reduced cost

The CBA Futures Initiative Report speaks of the trend toward ‘disaggregation’ of legal information and services, a process by which ‘clients become better informed of both the availability and complexity of products and services’. Lawyers no longer are the sole keepers of this information, and are no longer valued, with the exception of certain highly specialized areas of law, as the only source of this information. “Clients will undertake themselves those services with which they are more comfortable. They will seek out professional services where that is a more efficient option or where the service is outside their own knowledge base.”

This trend has led to the unbundling of legal services, which contributed to greater specialization. It can also lead to growth in delegation of tasks traditionally carried out by lawyers to non-lawyers, as non-lawyers become more skilled and adept at providing certain legal information and services more efficiently and at lower cost.

Furlong notes a significant catalyst toward a new, more specialized role for lawyers:

> Lawyers are just one of many providers of legal services, and they no longer provide the great majority of such services. Lawyers are the premier providers of advocacy, advising clients in online dispute-resolution forums and in trials (which are held in both traditional public and new privately run court systems). They also specialize in counsel: offering advice, analysis and judgment on significant decisions in the life of a personal or corporate client. While the volume of this work is nowhere near what lawyers once handled, it remains lucrative and in demand. Not only that, but lawyers have developed preventative law practices, providing holistic legal-health services that anticipate and avoid clients’ legal problems and thereby tapping a vast and previously latent market.

1.3 Changes in law firm structure and ownership

Law firms in Canada are still primarily structured in traditional ways, with partnerships models and no non-lawyer ownership. Among many of their corporate clients, there is an increasing trend toward insourcing their legal needs through in-house and corporate counsel. According to the CBA Futures Report:

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6 Ibid
7 Futures Initiative, p. 11
8 Ibid, p. 11
9 Five Catalysts, p. 4
In-house counsel form an industry within the industry. While typically lawyers work in a company’s legal department, more and more lawyers are using their legal skills to work in other parts of a company’s operations as well.\textsuperscript{10}

However, the CBA Futures Report also identifies the increasing pressure on firms from a number of sources to consider new law firm structures and arrangements:

\begin{quote}
With increased pressure from clients and competitors, managers of law firms have been forced to continually seek greater economies and efficiencies in their operations. In some segments of the legal services market, more attention is being paid to project management and client relationship management. Competitive pressures may cause some firms to consider new structural arrangements. Non-lawyer ownership is still rare in Canada (although permitted in Ontario for multi-disciplinary practices (MDP) as long as lawyers maintain control), but demand for new capital and the increased need to manage financial and other risks may create interest in altering existing regulation. The build-up of non-lawyer ownership, management, and participation outside of Canada may provide additional pressure for change in this area.\textsuperscript{11}
\end{quote}

These mounting pressures on law firms to change how they operate were recently highlighted in the GlobalLegalPost.com blog on August 8, 2013:

\begin{quote}
While legal expertise is still highly valued, legal teams today and, by extension, law firms are experiencing unprecedented pressure, forcing them to evolve quickly from old ways of working.
\end{quote}

The blog goes on to list three key pressures as the ‘legal industry’s new reality’:

- global regulatory uncertainty and change,
- cost pressures, and
- technology/data proliferation.

Furlong’s recent blog post on “The Evolution of the Legal Services Market – Stage 2” affirms the advent of ABSs in England and Australia has not seen the sky fall on lawyers and is not likely to in the future:

\begin{quote}
The most important development of this period [2008 to 2016 – the period of ‘creative destruction’], however, is the arrival in 2012 of Alternative Business Structures: non-lawyer ownership and capital in legal enterprises in England & Wales (building upon Australia’s trailblazing efforts a decade earlier). Starting with the consumer market, but eventually spreading to corporate and institutional work as well, new participants find willing buyers for their products and services. This development, while spawning the usual troubles of any startup industry, does not produce the widespread disastrous impact on professionalism and the public interest that some had predicted. The longstanding presumption that only lawyers could be trusted to offer legal services is called into questions, and officials in other jurisdictions start considering more closely the possibilities of regulatory reform to open the market.\textsuperscript{12}
\end{quote}

But the light has gone on in Canada over the past three years. ABSs are now being taken seriously here as a potential means to enhance access to justice, and create more creative and competitive means for delivery of legal services in the public interest. There are no studies measuring the impact of ABSs on reducing the costs of legal services and enhancing access to justice; this is most likely a reflection of the

\textsuperscript{10} Futures Initiative, p. 15
\textsuperscript{11} Ibid, p. 17
fact that to date, only a few of the several hundred law firms and entities that have been licensed as ABSs have targeted the consumer market, but those that have are making legal services more readily available through in person and online delivery. Overall, the most one can say at this point is that the jury is still out on the impact of ABSs, as they are structured in England, on access to legal services.

In 2012, the LSUC created the Alternative Business Structures Working Group to study and consider whether there are any new legal service delivery models that should be considered. It held a symposium on ABS during the first week of October, to which we were invited. The Working Group’s final report is scheduled to be completed in January 2014, and referred to Convocation in the spring of 2014, for this subject has become a key priority for the LSUC.

1.4 Regulation of lawyers vs. law firms vs. legal services/service providers

The conversation and debate about moving from solely regulating individuals to the regulation of law firms has been evolving and gaining considerable momentum. The Society was the first jurisdiction in Canada to do so. In a 2009 speech by Gordon Turriff QC, Past President of the Law Society of British Columbia, he said:

The Law Society regulates lawyers, not lawyers and firms, even though there are roughly 3,400 firms of lawyers in the province. As others here have pointed out, there may be a public interest in regulating firms, because firms have cultures and ways of doing things that firm members are expected to respect, and the firms, therefore, can influence lawyer conduct. We are exploring means by which firms can be drawn under the regulatory umbrella.13

In the seminal paper, “Regulating Law Firms in Canada,”14 Prof. Adam Dodek states that in carrying out our statutory mandate of protection of the public, law societies have for the past two centuries focused only on the conduct of individual lawyers, as opposed to law firms. This has been based, in part, on the fact that the ‘traditional model of the delivery of legal services then was the sole lawyer in private practice.’ That model has dramatically changed, but again, law societies have been slow to catch up with that change.

What is now emerging globally is the trend toward regulation of legal entities (ABS, MDP, ILP) and legal services (Law Society of Upper Canada regulation of paralegals). There are a range of opinions regarding whether the regulator of lawyers should expand to regulation of legal services, but there is no doubt among the new regulators that the regulation of lawyers should include law firms and legal entities.

1.5 Growth of corporate and in-house counsel

The crisis we face is not one that can be paused while we spend ten years examining our professional navels; the crisis we face is the relevance of the legal professionals to clients. No one suggests we should throw away professional standards, but regulations developed when most legal services were local and ‘tribunal’ in nature, when the fastest and surest means of communication was by saddlebag on horseback, and when lawyers played well-defined, exclusive and revered roles as interpreters of the law, may not create a meaningful foundation for offering professional services today.

The ‘new normal’ business model of value-based legal practice challenges the traditional legal service business model (for both firms and departments), as well as how lawyers themselves will engage with their clients to serve their needs. With a focus on moving away from billable hour

myopia and pyramid-shaped law firms with hugely inefficient staffing and business models, clients – led by their in-house counsel legal staff – are looking to apply business precepts for service delivery to the practice of law. This means asking outside lawyers to partner or team with in-house staff and other providers, as well as forcing law firms to understand and better predict their cost of service, commoditize or routinize work that is repetitive to each matter, deploy disaggregation/unbundling/Lean Six Sigma assessment of staffing and process efficiencies, engage in knowledge-sharing and collaboration, actively assess data in addition to their legal judgment in determining the best course to pursue, and join their inside peers in having ‘skin in the game’ in the provision of services.\textsuperscript{15}

This ‘new normal’ and changes in the legal services marketplace led, in part, by in-house and corporate counsel, are having a significant on the profession.

The Globallegalpost.com piece referred to earlier notes, “Corporate legal departments are not only seeking alternative fee arrangements, but also being more selective about the work being sent to outside counsel, so as to keep costs down without degrading quality. As a result, law firms are re-examining their business models to better demonstrate their price for value.”

Corporate counsel are already engaged in outcomes-focused work and risk identification and management. They have broken ground by creating ethical infrastructures within their corporations, and developing processes designed to minimize risk, particularly in the post-Enron and Sarbanes-Oxley era. As a result, corporate counsel are leading the way toward many of the new ways in which we could transform regulation and the manner in which law firms operate in future.

1.6 Globalization and evolution of the legal services market

Furlong maintains that:

\begin{quote}
The next 20 years will overturn much of what lawyers today still take for granted and will, for the first time in centuries, give rise to a legal services marketplace in which lawyers are not the dominant providers. The profession’s regulators will be swept up in this hurricane and will face challenges of their own.\textsuperscript{16}
\end{quote}

Furlong goes on to predict various changes in the legal services marketplace in the next 15 years – remember, most of what Furlong predicted over the past ten years has come to fruition! In addition to there being new roles for lawyers, and the widespread automation of legal services, there will be a proliferation of non-lawyer service providers, client empowerment will lead to a demand for pricing levels that drive increased lawyer efficiency, and new law firm models will develop as traditional law firms abandon the idea of partnership and operate as corporate entities. Furthermore,

\begin{quote}
“\textit{The bigger impact of globalization is in the rise of firms outside North America and Great Britain that vie for clients worldwide. The gradual deregulation of India’s legal profession, the growing centrality of the Chinese economy, and the continued rise of Brazil as a regional champion have all powered the development of non-Western firms up the international rankings.}”\textsuperscript{17}
\end{quote}

\textsuperscript{16} Five Catalysts, p. 3
\textsuperscript{17} Ibid, pp. 4-5
The CBA Futures Report supports Furlong’s contention about pricing changes, and adds, “Clients are expecting greater transparency and predictability for pricing of services.” It notes that currently, there is ‘growing demand from clients for lower prices’ generally, and it is time to recognize the slow death of the billable hour.

1.7 Membership demographics and the aging Bar in Nova Scotia

A September 2013 report to Council prepared by Glen Greencorn, the Society’s Director of Finance and Administration sets out an analysis of the demographic trends impacting the Society and its governance, including an aging Bar, new risks and a stagnant membership number.

1.8 Access to justice

There is strong opinion, if not yet clear evidence, from Australia and England that regulatory regimes that support ABSs will enhance access to justice through creativity, efficiency and lower costs in the provision of legal services. Many suggested that the key concern should be access to affordable legal services, rather than justice, and that the legal regulator has much more control over the former than the latter. Access to justice requires having control at multiple levels in the administration of justice, and some in the SRA maintain that while the regulator has a role to play, all stakeholders in the system of the administration of justice, such as the government and the judiciary, have to committed to the same goals in order for there to be significant improvement to access to justice.

As Council considers transforming regulation, we should consider how access to justice issues fit into our analysis of a best practices regulatory regime.

2.0 SELF-REGULATION AND THE PUBLIC INTEREST – THE FOUNDATIONS FOR WHERE WE ARE AND WHERE WE MIGHT GO

2.1 Independent lawyers – Independent regulators

*The legal profession has a unique position in the community. Its distinguishing feature is that it alone among the professions is concerned with protecting the person and property of citizens from whatever quarter they may be threatened and pre-eminently against the threat of encroachment by the state. The protection of rights has been an historic function of the law, and it is the responsibility of lawyers to carry out that function. In order that they may continue to do so there can be no compromise in the principle of freedom of the profession from interference, let alone control, by government.*

Before Council considers how and whether to transform the public interest regulation of lawyers in Nova Scotia, it must reflect on key principles in professional regulation, such as independence as it exists in reality, so these cornerstones are retained in any new foundation constructed.

It will also challenge assumptions. For example, is ‘independence’ a means or an end? Independence of the regulator should not be confused with the independence of the legal profession. There are strong advocates in Canada and elsewhere for having an intermediary public entity fulfilling some form of oversight role for the regulator of the legal profession. Is it necessary to forego full independence as a regulator in order to regulate ‘in the public interest’? Some say that independence of the regulator can only be justified if it is a means to the end of protection of the public interest.

18 Futures Initiative, p. 21
19 Ibid, p. 22
2.2 Independence is qualified – Regulators do not act alone

Though independence remains a foundational tenet of lawyer regulation, it can no longer be seen as ‘pure’ independence.

One theme that has emerged in modern thinking about self-regulation is that regulators do not act alone, but rather they are part of a complex system of regulation impacted by other entities and stakeholders. This is certainly the case in the legal profession where government legislation, the courts, social policies and other factors impact and affect lawyers and the practice of law. For example, the behavior and conduct of lawyers can be impacted by tribunals such as securities regulators or utility boards that have prescribed rules for those appearing before them. Regulators need to recognize their role in the larger context of factors impacting lawyers, and take care to harness this when adopting a regulatory regime.

The prescription is that regulation should be indirect, focusing on interactions between the system and its environment. It should be a process of coordinating, steering, influencing, and balancing interests between actors and systems, and of creating new patterns of interaction which enable social actors/systems to organize themselves … .

It is recognized that government is an important player in this complex system, serving various roles in the evolution of the legal profession, arguably in the public interest. The interest of government in legal regulation in Nova Scotia is best illustrated by the addition of s. 4(2)(d) of the Legal Profession Act when it was not specifically requested. Thus, the tension between law societies and government is seen by some as healthy, and by others as destructive. What is the reality of this relationship, and how it this relevant to any future regulatory regime?

This recognition – that regulators do not act alone and play a role that stretches beyond pure regulatory compliance – reflects changes that have taken place in law societies over the past two decades, as the reference above to the Fair Registration Practices Act illustrates.

In The Regulatory Craft: Controlling Risks, Solving Problems, and Managing Compliance, Malcolm Sparrow speaks of the complex role played by regulators, in terms of both lawyer expectations and those of the public, and the impact this can have on regulatory design.

Regulators do so much more than administer laws. They also deliver services, build partnerships, solve problems, and provide guidance. They choose not to administer a law. And in addressing important public problems they frequently seek to influence behaviours that are not regulated … . Regulators, depending on their conception of their role, may adopt an energetic and proactive stance in proposing and pursuing the kind of laws they think should govern their work.

The regulation of lawyers has become increasingly complex over the years, and requires an increasingly complex balancing of interests. The move towards national standards, through a Model Code of Conduct and National Admission Standards are ways that the Society has recognized that complexity and by seeking uniformity across the country, we have endeavoured to find the right balance as the regulator.

Regulators, under unprecedented pressure, face a range of demands, often contradictory in nature: be less intrusive – but more effective; be kinder and gentler – but don’t let the bastards get away with anything; focus your efforts – but be consistent; process things quicker – and be

21 Ibid, p.111
more careful next time; deal with important issues – but do not stray outside your statutory authority; be more responsive to the regulated community – but do not get captured by industry. 23

There is a question of whether the Society is ‘rowing or steering’ the ship of regulation. Is our core function to provide leadership and create standards that must then be fulfilled by others (steering), or do we undertake the work to ensure the competence and compliance of lawyers with the rules and standards (rowing). At this point in time, we do both: our Mandatory Continuing Professional Development program is an example of the Society ‘steering’ a process of continuing education – setting requirements and rules, but leaving it to others to provide, participate in and report on the education; our Professional Responsibility process sees the Society actively engaging with members through complaints resolution, investigations and audits to enforce compliance in the public interest (rowing). As we begin to consider a new regulatory model, will the ‘rowing’ model be more appropriate, or will we look to lawyers and law firms to become compliance champions, thus allowing us to ‘steer’ the regulatory ship?

2.3 Simplified regulation to promote competition and creativity

The Better Regulation Executive 2010 Report suggests that in order to eliminate ‘avoidable burdens of regulation and bureaucracy’, a regulator should:

- remove existing regulation that unnecessarily impedes growth (in our case, of law firm business);
- introduce new regulation only as a last resort;
- reduce the overall volume of new regulation;
- improve the quality of the design of new regulation;
- reduce the regulatory cost to business and civil groups; and
- move to a risk-based enforcement regime where inspections are minimized. 24

A good example of the Society’s recent efforts to amend the regulations in accordance with these suggested best practices is the change to principle-based trust account regulation approved in 2012. This saw the elimination of pages of detailed and complex regulations, to be replaced by simple, clear regulations based on key principles.

The theme of regulatory simplification has become a hallmark for new regulatory regimes, particularly as economic challenges have required regulators to become leaner and more efficient. The BRE Report goes on to say:

Regulators’ resources are often wasted on intrusive monitoring of the work of compliant businesses, and insufficient energy is given to dealing with those that choose to operate outside the system. The government aims to move away from a culture of rigid ‘tickbox’ regulation to one founded on professional competence, pragmatism and trust where businesses are treated as partners in securing the right regulatory outcomes and play a role in the design and implementation of standards, as well as the inspection and enforcement models which are right for the job. 25

‘Outcomes focus’ is designed to enable lawyers to put clients first, where this doesn’t prejudice the public interest; it is about achieving the right outcomes for clients; and it is flexible and a move away from prescriptive rules wherever this is appropriate. 26 It is part of the philosophy of an outcomes-focused approach that prescriptive rules are avoided if possible and practitioners use their professional judgment,

23 Ibid, p. 17
24 Ibid, p. 3
25 Ibid, p. 14
reflecting on the unique needs of their own clients and the nature of their practice, to decide how best to achieve the required outcomes. The regulator provides only limited guidance.\textsuperscript{27} Those who are familiar with the Society’s Practice Standards will know them as an initial foray into OFR, because they are drafted in ways that are not prescriptive, but state expected outcomes and depend on the exercise of lawyers’ professional judgment.

In 2005, the Nova Scotia Government created the Better Regulation Task Force. In a report called “Better Regulation 2005-10 Summary Report”\textsuperscript{28}, then Minister John MacDonell said:

\begin{quote}
Through Better Regulation, government employees worked to help business be more competitive by creating simpler, more effective regulation, and reducing administrative burden without compromising protection for the public.
\end{quote}

This initiative resulted in the creation in 2008 of the Regulatory Management Policy and Principles, together with training and a plain language guide. The focus was on streamlining and creating greater efficiencies in the way government regulates business and industries. The Report suggests that one benefit of this initiative has been to reduce the regulatory burden on businesses, which has in turn driven down the cost of goods. Of particular interest is reference to ‘outcomes focus’ rather than process:

\begin{quote}
Changes as a result of Better Regulation are often about making sure the focus is on the outcome of a regulation. That includes outcomes like protection for the public, stakeholders, and companies. So, if a simpler process produces the same benefits, it’s an easy choice.\textsuperscript{29}
\end{quote}

\subsection*{2.4 Putting new theories into practice – Regulatory reform in England – Focus on outcomes}

During the lead-up to the new 2007 Legal Services Act in England, the Better Regulation Task Force produced a report titled “Regulation – Less is More: Reducing Burdens, Improving Outcomes.” This report speaks of the so-called ‘Golden Rule’ of regulation, which is ‘what gets measured, gets done.’\textsuperscript{30} The report elaborates on the Task Force’s version of best practices in regulation:

\begin{quote}
Before new regulations are adopted and when existing regulations are reviewed, we expect them to pass five tests: proportionality, accountability, consistency, transparency and targeting ... \textsuperscript{31}
\end{quote}

The report refers to the Dutch approach to regulation, which targets the regulatory burden put in place to implement their regulations. This approach “… does not question the policy objectives of the regulations themselves, but seeks to ensure that the way the policies have been implemented is such that the policy outcomes are achieved with the minimum of burden.”\textsuperscript{32}

Nova Scotia’s Better Regulation Initiative has been driven by similar imperatives with similar results, namely: \textit{Essentially, BRI became about changing from a culture of “regulation is necessary” to one of “if necessary, effective regulation.”}\textsuperscript{33}

In order to achieve the regulatory targets, and reduce the administrative burden of regulation, the Report recommends that a regulator:

\begin{flushright}
\textsuperscript{27} Andrew Hopper, Outcome-Focused Regulation, 2011, Law Society Publishing
\textsuperscript{29} Ibid, p.9
\textsuperscript{31} Ibid, p.11
\textsuperscript{32} Ibid, p. 18
\textsuperscript{33} See fn. 32
\end{flushright}
1) remove obsolete regulations that no longer address current policy objectives;
2) simplify regulations;
3) increase data sharing and proving information management so that [government and] regulators only ask for information once; and
4) help businesses comply with the regulations, saving them time through presenting the requirements in a user-friendly way.34

2.5 Putting new theories into practice – Regulatory reform in England – Focus on risk

The NAO focused on the benefits of using Risk Impact Assessments or RIAs, as means of setting out the costs and benefits of a regulatory proposal, and the risks of not acting, as a means for delivering better regulation.35

The purpose of the Risk Impact Assessment is to explore the objectives of the regulatory proposal, the risks to be addressed and the options for delivering the objectives. It should make transparent the explicit costs and benefits of the options for the different bodies involved ... and how compliance with the regulatory options would be secured and enforced ... Policy makers could send the RIA to interested parties for comment.36

2.6 Putting new theories into practice – Regulatory reform in England – Sharing responsibility for lawyer regulation and compliance

This leads into a final theme relating to ‘co-regulation’, risk identification and management, and risk-based enforcement. This theme has become the cornerstone of the modern outcomes-focused regulatory regimes, particularly in England and Australia.

One of the more challenging aspects of implementing truly risk-based enforcement of regulation is to give appropriate recognition to a business’ own efforts to comply with regulation. More needs to be done to ensure that, where businesses have a good track record of compliance, this is taken into account by regulators, who will then reduce the inspection burden for them.37

A related theme is called ‘regulatory risk differentiation’, which is a means for identifying risk and applying regulatory resources to areas of higher risk in the public interest – a theme we have been adopting at the Society for a number of years, as evidenced by our Trust Audit Program. This process is also at the heart of the English model.

2.7 Reflections on the current state of Canadian legal regulation

Professor Richard Devlin, Associate Dean at the Schulich School of Law at Dalhousie University, has for some years advocated for and led a cadre of academic thinking about the need for dramatic change in regulation of the legal profession. In his paper with Albert Chang titled “Re-calibrating, Re-visiting and Re-thinking Self-Regulation in Canada,” he argues, “… recent developments in Canada … suggest there has been a significant increase in the regulatory vigour of law societies driven in part by a fear of losing self-regulation.”38 He goes on to say, “… law societies in Canada have been adopting an increasingly muscular approach to regulation of the profession.”39

34 UK Better Regulation, , p. 26
36 Ibid, p.2
37 Reducing Regulation, p.14
39 Ibid, p. 234
Prof. Devlin states:

Increasingly, Canadian law societies have recognized that their governance structures are antiquated and in need of modernization in order to respond to contemporary accountability norms and economic needs.\(^40\)

He observes law societies becoming more proactive in their regulation, rather than purely reactive, particularly with regard to complaints, and gives a number of examples of this:

- initiatives to enhance operational efficiencies;
- paralegal regulation;
- discussions around multi-disciplinary practices; and
- reforms to complaints and discipline processes.

But Devlin queries whether in 2010, law societies were engaging in a ‘regime of defensive self-regulation’.\(^41\) He cites examples of law societies’ battles to retain pure self-regulation in response to ‘judicial cajoling’ (the cases of Finney\(^42\), *FCT Insurance Co. v. LSNB*\(^43\), and conflicts cases) and attempts by government to embark on legislative interventions to self-regulation, such as through the Fair Access legislation, Agreement on Internal Trade and anti-money laundering legislation, and the response to the Competition Bureau.\(^44\)

Devlin suggests it is time to rethink regulation, in a way that focuses on the core values of regulation of the profession: democracy, efficiency, effectiveness and equitability. He also suggests that best practice regulation would identify the key facets of regulation – resources, processes and outcomes – and align these to support the core values. The outcomes-focused theme thus continues to emerge.

### 2.8 Summary of the evolution of regulation of the profession

In this section, we have explored a number of themes and trends respecting the evolution of regulation of the profession. These will hopefully help a reader understand some of the building blocks that should be retained and what else might be required in any new regulatory model:

i) the need to support the independence of the legal profession;
ii) ensuring that regulation of the profession is demonstrably conducted in the public interest;
iii) a move away from a ‘command and control’ model of regulation;
iv) understanding the benefits of ‘collective’ or modified self-regulation with a role for others in regulation;
v) ensuring a high level of transparency and public accountability;
vi) regulating in a way that influences behavior and does not just require compliance with rules;
vii) the benefits of a ‘light touch’ or a simplified regulatory model;
viii) the emergence of outcomes-focused regulation;
ix) the need to avoid ‘defensive self-regulation’;
x) the importance of improving ethical awareness by lawyers, and having a means for ethical assessment;
xii) the benefits of reducing regulatory burdens;
xiii) the benefits of effective risk identification, assessment and management; and
xiv) the importance of listening to and being able to address the critics of self-regulation.

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\(^40\) Ibid, p. 235
\(^41\) Ibid, p. 252
\(^42\) *Finney v. Barreau du Québec*, 2004 SCC 36
\(^43\) *Law Society of New Brunswick v. FCT Insurance Company*, 2009 NBCA 22 (CanLII)
\(^44\) Devlin, p. 254
3.0 CURRENT TRADITIONAL REGULATORY MODELS

Self-regulatory models in common law jurisdictions in Canada and Australia evolved from the English model under which, traditionally, a law society exercises authority delegated from government and governs admissions, standards, conduct and enforcement of professional discipline. In other words, regulation addresses the beginning, middle and end of a lawyer’s regulatory life. This differs from the approach familiar to U.S. lawyers where, under U.S. Constitutional doctrine, the courts have inherent and primary regulatory power over lawyers, admission to the Bar is a judicial function and lawyer discipline is done by the courts or under judicial supervision.

However, although the regulation of the profession in the United States differs in structure and form from regulation in Canada, questions about the fundamental relationship between regulation of the profession and the public interest are ones engaged deeply across both jurisdictions.45

Should government delegate self-regulatory authority to a profession whose response to significant changes has been perceived as an effort to retrench? How is the public interest being served? What institutional change is necessary? Will such change threaten or enhance the traditional self-regulatory authority of the legal profession? 46

4.0 NEW REGULATORY MODELS – AN ENVIRONMENTAL SCAN

Legal regulation has been transformed in England and parts of Australia. Major changes have also taken place in New Zealand and are underway in Scotland, Ireland and the Netherlands.

4.1 Australia

The emergence of co-regulation

Australia in general, and New South Wales (NSW) in particular, has led the world in transforming regulation of the legal profession since 1994. Over the past two decades, the Law Society of NSW and the NSW Bar Association have co-regulated the profession with the independently legislated Office of the Legal Services Commissioner (OLSC).

The 1993 Act authorized MDPs and the sharing of income between lawyers and non-lawyers. In 2001, legislation permitted the incorporation of legal practices, the sharing of income and the ability of lawyers and non-lawyers to deliver legal services together, without ownership restrictions. These new incorporated legal practices (ILPs), are required to have in place demonstrable, measureable ‘appropriate management systems’ (AMS).

The goal of this new approach to law firm regulation has been to help ILP leaders detect and avoid problems. Key to this has been risk profiling and practice review/audit programs, which fall under the purview of the OLSC.

Because ‘Appropriate Management Systems’ are not defined in the Legal Profession Act, the OLSC, after study, research and consultation, identified ten objectives for sound legal practice.47 ILPs are required to conduct a self-assessment process focusing on the ten objectives, and to file this with the OLSC, which then reviews them for assessment of risk, compliance and non-compliance.

Paul Paton, commenting on the Australian regulatory regime, notes that it appropriately focuses on the public interest:

45 Interview with Prof. Laurel Terry, October 7, 2013
46 Based on Paton, ibid, p. 94
47 www.olsc.nsw.gov.au
Increasing public distrust of the legal profession and greater focus on the rights of the consumer in a market-based economy also prompted significant change in Australia. Reforms unfolding for over a decade have resulted in the effective end of self-regulation by the legal profession, replaced with a co-regulatory system that separates regulatory from representative functions and creates a series of more independent disciplinary agencies operating closer to government than to the profession. Because the legal profession is regulated at the state rather than the federal level, changes have not been entirely uniform, though they are broadly similar. Three states provide for an independent body to administer complaints against lawyers, while the Law Society retains some degree of authority to establish ethics rules and practice standards against which lawyer conduct will be judged. Significant lawyer involvement in the regulatory process is an important feature. The end result is a system more focused on regulating in the public interest.

4.2 New Zealand

Voluntary membership
The Law Society of New Zealand regulates all lawyers: however, membership in the Society is voluntary. The Society is governed by a Council and managed by a Board, supported by an Executive Director.

Delegation of complaints handling
The Society operates a Lawyers Complaints Service, which deals with complaints against lawyers, incorporated law firms, and non-lawyer employees of both. All lawyers are required to have their own procedures for handling complaints, and are required to advise clients about these procedures before starting work.

The Lawyer Standards Committee handles investigations of complaints. The Committee can mediate, resolve or dismiss complaints, or refer matters to hearing before the New Zealand Lawyers and Conveyancers Disciplinary Tribunal.

If complainants or lawyers disagree with the decision of the Committee, they may request a review of it by the Legal Complaints Review Officer, who is appointed by the Minister of Justice and “provides independent oversight and review of the decisions made by the standards committees of the New Zealand Law Society … the LCRO’s reviews are as informal and straightforward as possible, while giving proper consideration to the process of the review itself and the law.”

This model represents a co-regulatory regime, with involvement of the Minister of Justice in key aspects of the Society’s regulatory functions, in the interests of accountability.

4.3 Ireland

In a state of uncertainty
Solicitors in Ireland are accountable to the Law Society of Ireland, and the Courts through the Solicitors’ Disciplinary Tribunal, an independent statutory tribunal appointed by the President of the High Court to consider complaints of misconduct against lawyers. In addition, the Office of the Independent Adjudicator exists as “… an independent forum to which members of the public may apply if they are dissatisfied with the manner in which the Law Society of Ireland has dealt with any complaint made by or on behalf of any person against their solicitor.”

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48 Paton, Between a Rock, p. 104
49 www.lawsociety.org.nz/complaints and discipline
50 www.independentadjudicator.ie
Over the last several years, a series of events unfolded, not dissimilar to those that gave birth to the new regulatory regime in England, which led to recent calls for significant change in regulation of the profession. These were in part driven by the impact of the 2008 financial crisis, the collapse of the Irish banking system and requirements imposed on Ireland by the European funders.

The Legal Services Regulation Bill of 2011, as of July 2013 was pending before Parliament. In essence, it will replace the regulatory functions of the Law Society with a new, government-appointed regulator. There will be a Legal Services Ombudsman to oversee the handling by the Law Society and Bar Council of three classes of complaints: inadequate services, excessive fees and misconduct.

Not surprisingly, the proposed changes, from the government’s perspective, have been very positive: “It provides for greater transparency for legal costs and greater assistance and protection for consumers of legal services. It also provides an entirely independent dispute system to determine allegations of professional misconduct and a new system for legal costs adjudication where legal costs are in dispute.”51 And “Legal reform is a chance to finally do the right thing for consumers.” 52

4.4 Scotland

Regulation of the legal profession in Scotland is also undergoing change, but not to the same ‘enforced’ extent as in Ireland.

The Law Society of Scotland is the professional body for solicitors. It governs through a Council made up of elected members as well as, more recently, non-solicitor members. Its authority currently comes from the Legal Services Act, enacted in November 2010. This relatively new Act allows solicitors to form partnerships with non-solicitors, and to have outside investors (although a majority share in any such business has to remain with solicitors or other regulated professionals). The Act creates a tiered regulatory framework, similar to that in England, in which the Scottish Government is responsible for approving and licensing regulators, who in turn will regulate the licensed legal services providers.53

Complaints about any legal practitioners are handled by the Scottish Legal Complaints Commission, created in 2007. Like the Legal Ombudsperson in England, the SLCC deals with front-line complaints and delegates conduct concerns to the relevant professional body. The Commission also plays an oversight role with regard to the conduct of complaints by professional bodies.

4.5 Netherlands

The legal profession in the Netherlands is at present very similar to our own, although it operates under a civil law system. The Dutch Bar Association serves the hybrid role as both regulator and advocate for the profession. It describes itself as a ‘self-governing profession’, operating under government-enacted statute.

Over the past year or so, the Dutch Government has been attempting to launch a bill that will give government extensive authority over the conduct of lawyers, impact the rights of client privilege and create different regulators. The Netherlands Bar Association and the Federation of European Bars perceive the proposal as a serious threat to independence of the legal profession, as there will no longer be ‘truly independent oversight in the interests of the litigants.’ 54 As previously noted, this sentiment is shared by the Law Societies of Norway, Sweden and Denmark.

51 The Department of Justice and Equality: Speech by An Tanaiste at Regulating the Professions in Ireland conference, November 10, 2006
52 Callaghan & Fox
53 www.scotland.gov.uk July 8, 2011
54 www.hg.org/bar-associations-netherlands.asp
President Van Win of the Dutch Bar, in responding to the government’s proposal, has said, “Whereas the three most important core values of ‘partiality, independence and confidentiality’ were more or less undisputed in 2006, these are at risk in 2012.” He states that because the government intends to incorporate the supervision of lawyers into a central body, without lawyers, with members appointed by the Minister and State Secretary of Justice, this represents an unacceptable interference with independence of the legal profession. At present, this bill remains under discussion.

5.0 OUTCOMES-FOCUSED AND RISK-BASED REGULATION – THE ENGLAND AND WALES MODEL

5.1 What is Outcomes-Focused Regulation (OFR) and how did it evolve in England?

The legal profession in England and Wales remains divided among barristers, solicitors and other providers of legal services, such as conveyancers. Each provider of legal services has its own regulator, which led to considerable challenges and dysfunction in the regulation of the legal profession up until the mid-2000s.

The evolution of OFR in England and Wales took place over 20 years ago when it evolved from principles-based regulation, which was incorporated into regulation of the financial services industry in England and Wales in 1990.

In general terms, Principles-based regulation means moving away from reliance on detailed, prescriptive rules and relying more on high-level, broadly stated rules of Principles to set the standards by which regulated firms must conduct themselves. However, there are a number of connected but distinct regulatory approaches working under the banner of “Principles-based regulation”, some of them suggesting potentially radical developments in the relationship between the FSA [UK Financial Services Authority] and the industry it regulates. At least three elements in the FSA’s current thinking can be identified:

- Broad-based standards in preference to detailed rules;
- Outcomes-based regulation;
- Increasing senior management responsibility.

In 2001, the Office of Fair Trading recommended the removal of restrictions on competition and restrictive rules respecting the provision of legal services. In 2003, the government appointed Sir David Clementi to carry out an independent review of the regulatory framework for legal services in England and Wales. The Clementi Report, published in December 2004, set out recommendations for radical reform of the regulation of legal services in England which led to new legislation in 2007.

The new Legal Services Act supports three key measures: simplification of the regulatory regime for lawyers and legal services; reform of the complaints procedures in the public interest; and increased competition through the approval of alternate business structures (ABS), with a goal of enhancing access to justice at reduced cost.

55 Ibid
56 www.overheid.nl July 30, 2013
57 I am grateful to the Solicitors’ Regulation Authority staff, and their various presentations and reports, for the historic and organizational information below.
Under the *Legal Services Act*, the Legal Services Board (the Board) was created as an entity independent of both government and the legal profession, to serve as the single, intermediary oversight body for approved regulators. The Board also oversees the office of the Legal Ombudsman (LeO, discussed below).

The LSA is founded upon:

i) eight Regulatory Objectives,
ii) five Professional Principles,
iii) six ‘Reserved’ Legal Activities, and
iv) the provision that only authorized or exempt persons are permitted to carry out a reserved legal activity.

The **eight Regulatory Objectives** under the Act are as follows:

i) protecting and promoting the public interest;
ii) supporting the constitutional principle of the rule of law;
iii) improving access to justice;
iv) protecting and promoting the interests of consumers;
v) promoting competition in the provision of services within subsection (2);
vi) encouraging an independent, strong, diverse and effective legal profession;
vii) increasing public understanding of the citizen's legal rights and duties; and
viii) promoting and maintaining adherence to the professional principles.

The **five Professional Principles** in the LSA are:

i) authorized persons should act with independence and integrity;
ii) authorized persons should maintain proper standards of work;
iii) authorized persons should act in the best interests of their clients;
iv) persons who exercise before any court a right of audience, or conduct litigation in relation to proceedings in any court, by virtue of being authorized persons, should comply with their duty to the court to act with independence in the interests of justice; and
v) affairs of clients should be kept confidential.

The **six Reserved Legal Activities** (those which may only be carried out by authorized persons under the LSA, or those exempt from authorization) are:

i) exercise of rights of audience;
ii) conduct of litigation;
iii) reserved instrument activities, being certain activities concerning land registration and real property;
iv) probate activities;
v) notarial activities; and
vi) administration of oaths.

The SRA has adopted an outcomes-focused model of regulation for solicitors, which is founded on strong risk identification and management procedures. OFR is a regulatory regime that focuses on high level principles and outcomes that drive the provision of legal services for clients, as compared with our traditional proscriptive, rules-based regulatory regime.
5.2 Outcomes-Focused Regulation as a regulatory norm

As the foundation of its OFR regime, the SRA has adopted **Ten Mandatory Principles** to which all solicitors must adhere, and which underpin all requirements in the SRA Code of Conduct or Handbook. Solicitors must:

1. uphold the rule of law and the proper administration of justice;
2. act with integrity;
3. not allow their independence to be compromised;
4. act in the best interests of each client;
5. provide a proper standard of service to their clients;
6. behave in a way that maintains the trust the public places in them and in the provision of legal services;
7. comply with their legal and regulatory obligations and deal with their regulators and ombudsmen in an open, timely and cooperative manner;
8. run their business or carry out their role in the business effectively and in accordance with proper governance and sound financial and risk management principles;
9. run their business or carry out their role in the business in a way that encourages equality of opportunity and respect for diversity; and
10. protect client money and assets.

The SRA Code of Conduct (Handbook) outlines the professional standards expected from all solicitors and law firms that it regulates. The Code is not prescriptive, but identifies ‘key behaviours’ as examples of how to achieve the outcomes listed above. They allow for flexibility in the way lawyers and firms provide legal services to clients, as long as they can demonstrate they are achieving the outcomes. For example, one outcome is that “clients are in a position to make informed decisions about the services they need, how their matter will be handled and the options available to them.” For a sole practitioner with a family law client, as compared to a global law firm with a multi-national corporate client, the way in which this outcome is achieved will likely be very different. By listing key indicators or behaviours associated with each outcome, this gives lawyers and firms, and the SRA a way (evidence) to measure whether the outcomes are being achieved.

Solicitors are also required to adhere to rules and regulations relating to such things as handling trust monies, how firms are required to liaise and interact with the SRA, and the discipline process. Having implemented the foundational Principles and Code of Conduct to support the OFR model, the SRA is now focused on simplifying its rules and regulations to be more principles-based as well.

A critical component of this OFR regime is risk identification and management, referred to as their **Regulatory Risk Framework**. This framework is based on a cyclical process that can be described as follows:

- **Identify** – before acting, they identify risks based on a central risk index;
- **Assess** – they assess risks consistently and share these assessments across the SRA to foster understanding;
- **Evaluate** – they continually evaluate their effectiveness by monitoring changing outcomes;
- **Control** – they control unacceptable risk levels through regulatory tools;
- **Monitor** – they monitor risk levels against their tolerance to direct control activities; and
- **Learn and adapt** – they learn and adapt their tolerance, resource levels and approach to controlling risks.
Proportionality is an essential component of the SRA’s OFR and risk-based regulatory regime. It is the foundation for the drive to simplify the regulatory burden on lawyers to eliminate the one-size-fits-all approach to regulation and to focus resources and regulatory compliance tools on areas where the greatest risks to the public and consumers lie. In identifying risks, the SRA considers its ‘regulatory risk appetite’ as part of this proportionality assessment: which risks can be tolerated or are acceptable, and which require a diversion of resources in both a proactive and reactive manner?

5.3 Risk monitoring

Risk monitoring is another key component of this regime. It is a way to protect the public better but at less cost and in a less intrusive way for firms. The monitoring takes place to ensure that risks are constantly reassessed in line with the SRA’s tolerance, with escalated responses when and where appropriate. Identified risk tolerances provide thresholds against which consistent action can be taken across the SRA. Implementation of internal controls with respect to organizational decision-making is another key component. The SRA has carefully analyzed where and when decisions of any kind are made throughout the organization, the level of impact of those decisions, and the internal controls needed to ensure consistency and proportionality in decision-making. In this way and others, risk management concepts are embedded in terms of organizational structure and culture.

5.4 The creation of new ownership models – the Alternative Business Structure (ABS)

As noted earlier, the OFR and risk management regulatory regime is focused on public protection, as well as opening up competition in the legal services marketplace. The Legal Services Act 2007 specifically contemplates the development and approval of ABSs.

ABSs allow non-lawyers to own and manage law firms and enable existing firms to accept external investment. The goal is to increase the quality, diversity and choice in legal services, increase capital investment, develop new approaches to law firm management, and reduce costs for consumers. There are currently almost 200 approved ABSs in England. About 75 per cent of these represent traditional firms that have changed their ownership structure to include non-lawyer investment. Innovation and creativity in the development of new and unique business models has been slow to develop, in part because of the challenges facing such innovative structures when seeking approval from the SRA. The SRA is actively making changes to streamline and simplify the application process, and deal with the backlog of 100 applications. This ‘Red Tape Initiative’ also seeks to focus better on actual risks relating to ABSs, which are supported by facts and evidence, rather than assumptions about risk. By regulating legal entities, the SRA regulates any entity within which even one lawyer is employed. If a legal services provider offers any one or more of the ‘reserved’ legal services set out in the Act, then the provider must be an authorized legal services provider.

ABSs in operation today include the global law firm of Slater Gordon, virtual law firms such as Lucy Scott Moncrieff (legal aid and consultations), Cooperative Legal Services (providing legal information and document creation services by non-lawyers), the Stobarts Group (Eddie Stobarts’ trucking, a national trucking and infrastructure business with its own in-house litigation law firm, Stobarts Barristers), and firms offering legal services and related services such as insurance, financial services, pharmacy and yogurt production.

In order to manage the unique risks associated with ABSs, the SRA created ‘separate business rules’ that layer on top of the SRA principles and risk management regimes required of firms. These seek to address such issues as client confidentiality within an environment of information sharing between non-lawyers and lawyers.

59 Solicitors Regulatory Authority, “Risk Outlook 2012: The SRA’s assessment of key risks to the regulatory objectives”, July 2013, p. 17
Another tool used to enhance entity compliance is the requirement that each entity have a Compliance Officer for Legal Practice (COLP) and Compliance Officer for Finance and Administration (COFA). The responsibilities of these officers are clearly laid out in the rules and regulations, and they are a means for ‘embedding the new practices and culture required to make risk-based OFR effective.’

Each member of the SRA Supervision Team is linked to the COLPs and COFAs for a number of firms, and has the responsibility for communicating regularly with them about their firms’ implementation of appropriate management policies and procedures, and management of risks and complaints.

5.5 Lessons learned in England

Based on the series of interviews conducted in July 2013, there was general consensus that OFR represents:

- a consumer-driven regulatory model;
- extensive Code of Conduct replaced with Ten Mandatory Principles;
- an objective to reduce ‘box ticking and form filing’ to give firms more freedom to focus on providing strong quality of service within their particular context (no more ‘one-size-fits-all’ regulation);
- development of clear regulatory objectives to assist lawyers in meeting objectives;
- allowing the regulator to focus on firm and fair regulation to help firms improve standards, and to focus disciplinary resources on those firms unwilling to comply with principles;
- development of comprehensive decision-making guides for all regulatory staff to ensure fairness, transparency and consistency in decision-making; and
- a means to encourage creativity in the provision of legal services (e.g., Alternate Business Structures).

In terms of whether OFR improves regulation in the public interest, there was a greater diversity of views. The following comments were noted:

- OFR requires creation of intelligent authorization processes so that only fully authorized firms and individuals are deemed fit to provide legal services in the public interest.
- OFR requires enhanced supervision of firms by the regulator to proactively identify, de-escalate and address risks in the public interest.
- OFR requires ‘firm, proportionate, transparent enforcement’ to deal with those who will not or cannot comply with the principles, in the public interest.
- OFR requires clearly articulated, robust, relevant and evidence-based risk criteria that enable the regulator to focus resources on serious, materials risks, in the public interest.
- OFR provides a fair and accessible means for public complaints about lawyer service and conduct, with authority for early and meaningful resolution of complaints where appropriate.
- OFR enhances access to justice through the provision of legal services outside the traditional law firm structure, and the improvement in the quality of legal services provided to all consumers.

Each interviewee was asked to describe their challenges in implementing OFR and a risk-based regulatory system. They identified:

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60 Ibid

61 With various SRA staff, LeO, the Bar Standards Board, the Law Society and others
• Layers of pre-existing legislation are not yet amended and create friction with the *Legal Services Act*, e.g., conveyancers legislation permits representation of vendor and purchaser, while the new LPA does not.
• There is a need to effect cultural change both within and outside the regulatory organization – staff is more comfortable with prescriptive rules and guidelines for compliance, and this is very difficult to change.
• There is a need to transform IT systems and infrastructure.
• There is a need to develop strong buy-in from lawyers and stakeholders as part of the new self-compliance regime.
• There is a need to adapt the regulation to new legal services business structures with the public interest at the forefront.
• In England’s case, it is still dealing with eight approved regulators of legal services – a single regulator would work far better.
• The SRA is still rolling out OFR; e.g., trust account rules are not yet in OFR format.
• It is important to help consumers understand how complaints are handled between Solicitors’ and Barristers’ regulators and the Legal Ombudsman Office.
• It is important to work with legal educators and trainers to transform the skills taught to match the OFR principles.
• Having adequate resources to be able to respond to all serious risks in the public interest is critical.
• Making OFR and risk management relevant to law firms of all sizes, including global and sole, is a challenge.
• The need to constantly identify potential and emerging risks as well as current ones, and adapt the risk framework accordingly, is another challenge.
• Developing effective outcomes measurement systems to provide evidence that consumer protection is being improved is key.62

5.6 England continues to measure success and impact

From the outset, the Legal Services Board has monitored and measured the effect and impact of the OFR regime, and the extent to which it adheres to the eight principles set out in the *Legal Services Act*. In October 2012, the Legal Services Board released “Market Impacts of the Legal Services Act 2007 – Baseline Report (Final) 2012.” In November 2012, the Legal Ombudsman released a research report on “Customer Satisfaction Surveys 2011-2012,” and in July 2013, the SRA released “Risk Outlook 2013 – The SRA’s assessment of key risks to the regulatory objectives.” These reports point to much progress, with continued room for improvement.

There are many critics of the OFR and risk-based regulation, but the benefits of aspects of it cannot be denied. There is evidence in the reports referenced above that demonstrates the positive impact it has had on how lawyers and law firms serve consumers, how they do business, how they manage risk, how they manage complaints and public expectations, and the extent to which they are accountable to a transparent and fair regulator. As compared with the pre-OFR regime, there is no doubt the public interest is being better served, but what is also clear is that the ‘house’ within which this dramatic renovation is taking place may crumble without significant attention to addressing the current dysfunction and barriers between the various ‘rooms’.

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6.0 Matters Council will want to consider

What is the possible take-away from this research, and the lessons being learned in England and Australia? Ultimately the Society must determine if our ability, as the regulator of the legal profession, to truly serve the best interests of the public is hampered by our one-size-fits-all, prescriptive, reactive, rule-based regulatory regime. Our current system was developed when most lawyers practised as sole practitioners or in small firms; when the risks were simpler and easier to spot (who considered the complexities of a well-thought-out mortgage fraud scheme 20 years ago?); when clients had little or no access to legal information other than through a lawyer; and when the idea of a law firm in England opening an office in Texas (or U.S. lawyers having an office in Nova Scotia) was unheard of. The legal services marketplace has already undergone a significant evolution, and yet the way we regulate lawyers hasn’t changed for decades.

The complexity of the new English regulatory regime is beyond what is needed in Nova Scotia; however, there are components of both the English and Australian systems that could work extremely well here.

Council will want to consider:

- expanding and clarifying ‘regulatory objectives’ along the lines set out in the Legal Services Act;
- moving to a principles-based approach to regulation, if not all the way to OFR;
- implementing a consistent, organizationally embedded risk-based approach to regulation;
- adopting a proactive approach with lawyers and law firms through education, engagement, the creation of an appropriate management systems-based approach, and the provision of tools and training to help firms of all sizes practise ethically and competently in the public interest and develop an embedded ethical infrastructure;
- allowing firms the room to establish appropriate management systems that suit the nature of their clientele and to demonstrate their effectiveness, then refocus our attention and resources on supporting sole practitioners and small firms in achieving appropriate management systems and avoiding problems (something none of the new regulatory models have yet achieved); and
- remaining focused on the public interest, but rather than protect lawyers’ monopoly on legal services, by clearly developing new regulatory objectives, broaden lawyers’ ability to work in ABSs, MDPs and virtual law firms, and expand the capacity for paralegals and non-lawyers to provide legal information and services, thereby reducing the costs of legal services and enhancing access to affordable justice.

We have the tools and the ability to create the best regulatory system for lawyers in the world. Are we ready for the challenge?